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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. § 8347(c), which states that decisions of the Office of Personnel Management on questions of disability and dependency are "final and conclusive and are not subject to review," precludes judicial review of these decisions.

2. Whether the Federal Courts Improvement Act vests exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit to review civil service retirement matters under 5 U.S.C. § 7703.

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BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court grant certiorari and resolve the important questions presented by this case relating to the Civil Service Retirement Act, the Civil Service Reform Act of 1978, and the Federal Courts Improvement Act.

STATEMENT

The Civil Service Retirement Act ("Retirement Act"), 5 U.S.C. §§ 8331-8348, Pub. L. No. 66-215, 41 Stat. 614 (1920), as amended, provides specific entitlements to federal employees who have contributed to the retirement fund for a minimum of five years. The Retirement Act provides for several types of annuities, including, for example, immediate retire-

ment, deferred retirement and discontinued service retirement, for several different classes of federal employees, including members of Congress, government agency employees, and federal law enforcement officials. The Retirement Act also provides for disability retirement benefits for employees who have become permanently disabled from rendering useful and efficient service and who have contributed to the retirement fund for five or more years.

Petitioner Wayne Lindahl is a former federal employee, who, because his severe bronchitis rendered him unable to perform the duties of his position, was removed from federal service. Believing that he had a "disease or injury" which precluded him from "rendering useful and efficient service," and having contributed to the retirement fund for more than five years, Mr. Lindahl applied for a disability annuity. The Office of Personnel Management and ultimately the Merit Systems Protection Board ("MSPB") rejected his application for an annuity. Mr. Lindahl petitioned the Court of Claims for judicial review of the MSPB decision. The United States Court of Appeals for the Federal Circuit (successor to the Court of Claims), in an *en banc* decision, dismissed his petition on jurisdictional grounds, a plurality holding that 5 U.S.C. § 8347(c) precludes judicial review of voluntary disability retirement decisions. In so holding, the Federal Circuit overruled twenty years of its own precedents and acted contrary to the majority of the circuit courts that have addressed this issue and have held that judicial review of voluntary disability retirement decisions is available.

INTEREST OF NARFE

NARFE is a non-profit, incorporated association, having its principal place of business in Washington, D.C. From its original 14 charter members, NARFE has grown to a membership now approaching half a million federal annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. The national membership is orga-

nized in more than 1600 local chapters and 50 state federations. NARFE ha been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades. Moreover, when significant legal issues concerning the retirement system have been raised by administrative or judicial action, NARFE has participated in, or itself initiated, litigation for the common good of its members.

This case, because it raises fundamental questions about the character and legal status of the annuity rights earned through federal employment and the role of the courts in enforcing those rights, directly implicates paramount interests of NARFE. It is for this reason that NARFE sought and obtained the permission of the parties to participate before the Court as *amicus curiae*.

REASONS FOR GRANTING THE PETITION

1. This case presents issues of substantial public importance. The decision below eliminates completely the traditional role of the courts in protecting federal employees against arbitrary denials of earned retirement benefits. In precluding judicial review of disability retirement matters, the court of appeals has misconstrued the applicable statutory requirements and acted contrary to twenty years of precedent of its predecessor court.[1] It has also rejected the holdings of a majority of the courts of appeals that have addressed the issue and have concluded that judicial review is available.

Beyond this, the Federal Circuit's decision itself is a plurality ruling that reflects substantial differences among the judges of that court. Chief Judge Markey, writing for himself and four other judges, concluded that no judicial review was

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[1] *See Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980).

available whatsoever. *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391, 400 (Fed. Cir. 1983). Judge Nichols separately concurred, concluding, however, that review is available for "unconstitutional and void determinations, where Congress could not reasonably, in light of history, have expected the preclusion to be effective." *Lindahl*, 718 F.2d at 405. Judge Nies also concurred separately, writing that not "all aspects of a disability claim are precluded from review." *Id.* Four judges dissented, concluding that Congress did not intend to preclude judicial review. Thus, six of the eleven judges would allow some review, although the contours of this review are not clear.[2]

2. Since the enactment of the Civil Service Reform Act in 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), several circuit courts have considered the effect of the limiting language of 5 U.S.C. § 8347(c).[3] The Ninth, Eleventh, District of Columbia and Tenth Circuits have all allowed judicial review of disability retirement decisions,[4] while the Federal, Fourth and Eighth

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[2] The Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 39 (1982), vested exclusive jurisdiction in the Federal Circuit to hear cases arising under 5 U.S.C. § 7703. *Lindahl* determined, however, that disability retirement matters are not § 7703 appeals. According to the decision, even if judicial review of such matters were not precluded, review would not lie in the Federal Circuit.

[3] In pertinent part, 5 U.S.C. § 8347 provides:

> (c) The Office shall determine questions of disability and dependency arising under this subchapter. The decisions of the Office concerning these matters are final and conclusive and are not subject to review. . . .
>
> (d) An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[4] *See Parodi* v. *Office of Personnel Management*, 690 F.2d 731 (9th Cir. 1982); *McCard* v. *Merit Systems Protection Board*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *Office of Personnel Management*, 707 F.2d 1499 (D.C. Cir. 1983); *Pitzak* v. *Office of Personnel Management*, 710 F.2d 1476 (10th Cir. 1983).

Circuits have held that no review is available.[5] The Third Circuit epitomizes the confusion surrounding this issue. One case, following the Eighth Circuit ruling in *Morgan* v. *Office of Personnel Management*, 675 F.2d 196 (8th Cir. 1982), was dismissed on jurisdictional grounds.[6] A subsequent case, however, was considered on the merits and the court held that it was only precluded from reviewing the "factual determinations" of disability.[7]

Squarely framed, the question that has divided the circuits is whether the finality provision of 5 U.S.C. § 8347(c) precludes or merely limits judicial review of disability retirement matters. The Ninth Circuit and the District of Columbia Circuit, particularly, have held that this language affects the *standard* rather than the availability of review. *Parodi* v. *Merit Systems Protection Board*, 690 F.2d 731, 735 (9th Cir. 1982); *Turner* v. *Office of Personnel Management*, 707 F.2d 1499, 1504 (D.C. Cir. 1983). The Federal Circuit has rejected these decisions for what the plurality termed the "sounder conclusion" that § 8347(c) operates as an absolute bar to judicial review. *Lindahl*, 718 F.2d at 386.

In the Federal Circuit plurality's view, it "is difficult to conceive of a more clear-cut statement of congressional intent to preclude review" than § 8347(c). *Lindahl*, 718 F.2d at 393.[8] While the starting point for discerning congressional intent is

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[5] *See Henderson* v. *Office of Personnel Management*, 724 F.2d 119 (Fed. Cir. 1983) (extending the *Lindahl* holding to cases of involuntary retirement); *Chase* v. *Office of Personnel Management*, 695 F.2d 790 (4th Cir. 1982); *Morgan* v. *Office of Personnel Management*, 675 F.2d 196 (8th Cir. 1982).

[6] *See Campbell* v. *Office of Personnel Management*, 694 F.2d 305 (3d Cir. 1982).

[7] *See Lancellotti* v. *Office of Personnel Management*, 704 F.2d 91, 97 (3d Cir. 1983).

[8] *But see* 5 U.S.C. § 8128 (1982), concerning worker's compensation benefits, which provides that administrative decisions are "final and conclusive for all purposes and with respect to all questions of law and fact" and "not

the statutory language, *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), the presumption favoring judicial review of administrative action is not easily overcome and will not be rebutted unless there is "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). Thus, as a general rule, a statute will not be construed to restrict access to judicial review absent "clear and convincing evidence" of congressional intent to do so. *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974). This presumption of reviewability is especially strong where, as here, "definitive personal rights are created by federal statute, similar in kind to those customarily treated in courts of law." *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944).

There is no "clear and convincing" evidence here that Congress intended to preclude all judicial review of disability retirement matters. Indeed, the evidence is to the contrary. The decisions in *McCard*, *Turner* and *Parodi* set out the reported legislative history pertaining to § 8347(c), particularly its 1980 amendment,[9] and conclude that Congress acted to *broaden*, not limit, access to judicial review. Thus, at a minimum there is an uncertainty on this score. The existence of this uncertainty, and the Federal Circuit's failure to resolve it in favor of allowing judicial review, *Abbott Laboratories*, 387 U.S. at 140; *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975), both suggest that consideration by this Court is warranted.[10]

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subject to review by another official of the United States or by any court by mandamus or otherwise." *See also* 38 U.S.C. § 211(a) (1982) (similar nonreviewability language for veterans benefits).

[9] Pub. L. No. 96-500, 94 Stat. 2696 (1980).

[10] It cannot be claimed that the palpable split among the circuits is moot because the Improvement Act vests exclusive review of MSPB decisions in the Federal Circuit. Indeed, the *Lindahl* decision itself negates any such contention because six of the eleven judges acknowledge that there is review in some court, if not the Federal Circuit. *See* note 2, *supra*. Thus, the issues of reviewability and the dimensions of review will recur in the other circuits and those rulings contrary to *Lindahl* will continue to have vitality.

3. Review by this Court is especially appropriate here because the decision below departs from the well-established principle that an administrative agency's construction of the statutes which it is charged with administering is due substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, 442 U.S. 544, 553 (1979). The Merit Systems Protection Board has consistently held, even prior to the adoption of the 1980 amendment, that it hears disability retirement matters under 5 U.S.C. § 7701. *See Hein* v. *Office of Personnel Management*, 1 MSPB 396 (1980); *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981). Hence, the Board has regularly advised unsuccessful applicants of their right to seek judicial review under § 7703. *See Turner*, 707 F.2d at 1504; Petitioner's Appendix at 68a. The Federal Circuit, without warrant, failed to accord the Merit Systems Protection Board's views the deference they were due.

4. Review by this Court is also warranted because the interpretation of the retirement laws adopted by the court below raises serious constitutional issues that can and should be avoided. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 149 (1979); *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). The Federal Circuit improperly dismissed any constitutional concerns by characterizing retirement benefits as gratuities that did not rise to the level of property protected by the Fifth Amendment. *Lindahl*, 718 F.2d at 392; *id.*, 718 F.2d at 397. It is, however, axiomatic that federal employees have protected property interests in their compensation, and that retirement annuities are part of this compensation. *Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983). In view of this, the Federal Circuit's decision cutting off all access to judicial review of disability retirement disputes raises serious constitutional questions. *See Guam* v. *Olsen*, 431 U.S. 195, 204 (1976); *Ortwein* v. *Schwab*, 410 U.S. 656, 665-66 (1973) (Marshall, J. dissenting); *Id.*, 410 U.S. at 661, 662-63 (Douglas, J.

dissenting); *Ralpho* v. *Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977). This Court has admonished the lower courts to avoid these constitutional dilemmas when it is possible to do so. The constitutional issues presented here could easily have been avoided, since it can hardly be said that the construction endorsed by the court below was unambiguously mandated. That court's failure to heed the admonition against unnecessarily raising constitutional conflicts is another reason supporting review by this Court.

5. The Federal Courts Improvement Act created the Federal Circuit to provide uniformity and special expertise in certain areas, including civil service matters. To this end, Congress provided that exclusive review of all cases arising under 5 U.S.C. § 7703(b)(1) and (d) was to be in the Federal Circuit. 28 U.S.C. § 1295(a)(9). In the decision below, however, the Federal Circuit determined that its jurisdiction under § 7703 does not include review of voluntary disability retirement decisions. This holding defeats the clear purpose of the Improvement Act and invites multi-circuit judicial review of this one class of Merit Systems Protection Board cases.

The legislative intent behind the Improvement Act is unambiguous. Concerned that prompt and definitive answers to legal questions of nationwide significance were often unavailable, Congress sought to reorganize the appellate structure of the federal courts. Finding particular areas of the law especially lacking in national uniformity, Congress acted to create an appellate court whose jurisdiction was based on subject matter, rather than geographic distinctions. *See* S. Rep. No. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 11. Important here is Congress' decision to provide the new court with exclusive jurisdiction to review final decisions of the Merit Systems Protection Board. 28 U.S.C. § 1295(a)(9).

Notwithstanding this clear legislative purpose, the Federal Circuit has how determined that final MSPB decisions on disability retirement matters are not appealable under § 7703, either by claimants or by the Office of Personnel Management.

Lindahl, 718 F.2d at 399; *Henderson* v. *Office of Personnel Management*, 724 F.2d 119 (Fed. Cir. 1983). Thus, for example, while 5 U.S.C. § 7703(d) provides that "[t]he Director of the Office of Personnel Management may obtain review of *any* final order of the Board" (emphasis added), the Federal Circuit concludes that it is not the proper court to entertain any such petition for review if it involves disability retirement. *See Lindahl*, 718 F.2d at 405 (Nies, J. concurring).[11] The Federal Circuit has artificially restricted its jurisdiction to consider only some appeals of Merit Systems Protection Board decisions, presumably leaving resolution of others to the district courts.

By declining to hear disability retirement cases, the Federal Circuit has contravened two acts of Congress that were specifically designed to rectify perceived problems with judicial review of civil service cases.[12] Rather than assist in the resolution of these problems by ensuring that all civil service cases be reviewed in a single court (as contemplated by the Improvement Act), and directly at the appellate level without an intervening record review in the district court (a requirement of the Reform Act), the decision below undermines both purposes and adds confusion to the area.

The Federal Circuit was intended to be the only circuit level court with jurisdiction to hear appeals from the Merit Systems Protection Board. It was created specifically to provide nation-

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[11] It is especially significant here that six of the eleven judges believe that some form and degree of review remains available. *Lindahl* holds, however, that this review is not available in the Federal Circuit. *See also Henderson* v. *Office of Personnel Management*, 724 F.2d at 120-21.

[12] One of the most significant changes made by the Civil Service Reform Act was to provide for judicial review in the courts of appeals "incorporating the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies." H. R. Rep. No. 1717, 95th Cong., 2d Sess., 143, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2876. *See also Polcover* v. *Department of Treasury*, 477 F.2d 1223, 1225-26 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973).

al uniformity and to relieve other courts of the burden of determining complex questions of law arising in certain subject matter areas, including the federal personnel area. *See* S. Rep. No. 275, *supra*, at 3, 1982 U.S. Code Cong. & Ad. News at 13. Paradoxically, in the name of zealously "avoiding the unauthorized jamming of the courthouse door," *Lindahl*, 718 F.2d at 396, the court has negated the clearly expressed congressional purpose and has also ensured that the doors of other courts will be "jammed" with cases that Congress wanted the Federal Circuit to hear.

The propriety of the Federal Circuit's restrictive determination of its jurisdiction contrary to clear congressional intent presents an important question of federal law which should be answered by this Court. It is an especially important question now, arising as it does in the Federal Circuit's formative stages.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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